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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re SERGIO E., a Person Coming Under
the Juvenile Court Law.

B172442
(Los Angeles County
Super. Ct. No. CK43245)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

PATRICIA E.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Daniel Zeke Zeidler, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant.

Lloyd W. Pellman, County Counsel, Larry Cory, Assistant County Counsel, and Arezoo Pichvai, Deputy County Counsel, for Plaintiff and Respondent.

Patricia E. (mother) appeals from the January 12, 2004, order discontinuing her visitations with her son, Sergio. She contends: (1) the juvenile court abused its discretion in terminating visitation because there was insubstantial evidence of detriment; and (2) the decision to terminate visitation was prejudicial to mother's ability to avoid adoption from becoming the permanent plan. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

This family first came to the attention of the Department of Children and Family Services (the department) on March 28, 2000, when mother tested positive for crack cocaine after giving birth to Sergio's half-brother, Guadalupe M., who also tested positive. Mother committed to a Voluntary Maintenance Contract, but failed to comply with its terms. On August 12, 2000, the department detained Sergio and Guadalupe, as well as Guadalupe's brother Alfredo, after mother left them home alone at 11 p.m. while she went out to buy milk.¹ At the time, the whereabouts of Sergio's father were unknown and mother had been living separately from Julian M., father of Alfredo and Guadalupe. When Julian M. subsequently was interviewed by the police, he admitted punching mother in the face, but said he was provoked by frustration over mother's neglect of the children and her drug use. He agreed to participate in spousal abuse counseling. Mother, meanwhile, was convicted of cruelty to a child likely to produce great bodily injury or death (Pen. Code, § 273, subd. (a)).

Pending disposition of a Welfare and Institutions Code section 300, subdivisions (a) and (b) petition, the children were placed in non-relative foster placement. Separate monitored visits were ordered for mother and Julian M. While mother was incarcerated,

¹ Collectively the minor and his siblings are referred to as the children. At the time they were detained, Guadalupe was 5 months old, Alfredo was 5 years, 11 months-old and Sergio was 6 years, 9 months old.

the children had regular weekly monitored visits with Julian M. Mother was still in custody, but appeared at the September 20, 2000, hearing at which the juvenile court sustained the petition and ordered the minors' custody transferred to the department for suitable placement. Monitored visitation and reunification services for mother and Julian M. were ordered.

At the time of the status review hearing on March 21, 2001, mother was still incarcerated but scheduled for release on March 26, 2001. She had not visited with the children because she did not want them to see her while in custody. The children were still placed together in non-relative foster care. Meanwhile, Julian M. had remarried, was planning to move with his wife and new step-son into a two-bedroom apartment for the purpose of reunifying with Alfredo and Guadalupe; and had expressed a desire to obtain a foster care license so that Sergio could live with him. He had begun unmonitored visits with the children. Testing had revealed that Sergio had no developmental delays, but was of borderline intelligence with various learning disabilities. He presented as a "frightened and scared" child, but was beginning to feel more comfortable in his foster home placement. Reunification services were ordered to continue and the matter was scheduled for a September 19, 2001, review hearing.

On August 31, 2001, the juvenile court granted the department's request for an order returning all three children to Julian M.'s home. Sergio and Alfredo had both expressed a desire to live with Julian M., who was in compliance with the case plan, had moved to an appropriate and adequate home, and had been having successful weekend overnight visits with the children. Mother, however, was not in compliance. She had been terminated from the Community Prevention Recovery Program as a result of her unexcused absences, failure to comply with the program's rules, and her general attitude "of not caring and feeling that she doesn't need to be here."

In a letter dated September 14, 2001, from Sergio's therapist to the social worker, the therapist opined that Sergio was suffering from Post-Traumatic Stress Disorder "due to the lifestyle he witnessed between his mother and [Julian M.]." Although Sergio

initially objected to meeting with both mother and Julian M., he had made progress in therapy and “his behavior prior to and following visits with [Julian M.] has improved. In therapy he has been able to discuss memories of the situations he experienced especially by witnessing his mother’s lifestyle. He has also [begun] to process his feelings of attachment and abandonment. As reunification with [Julian M.] approached, Sergio exhibited an outburst of acting out behavior in the foster home. These feelings were/are also being dealt with in therapy and foster mother reports that the negativistic behavior has subsided. At present, Sergio awaits returning to the home of [Julian M.] so he can be reunited with his family.”

By September 19, 2001, Guadalupe and Alfredo were living with Julian M. Sergio was still in foster care but having overnight visits with Julian M., who continued the process of obtaining a foster care license. Although she had not complied with various aspects of the reunification order, mother had begun monitored visits with Sergio.² Those visits were scheduled for two hours but mother usually requested the visit end after just 20 minutes. Julian M. complained that mother was calling his home, using profanity and demanding visits. The department recommended terminating mother’s reunification services. The matter was continued to October 23, 2001, to allow for proper notice to mother.

By October 23, 2001, Julian M. had obtained a foster-care license, was in the process of licensing his home, and had expressed a desire to adopt Sergio. Sergio was still living in non-relative foster care, but wanted to live with his half-siblings. The department opined that adoption was in Sergio’s best interest and reiterated its recommendation of termination of mother’s reunification services. Finding mother had not complied with the case plan, the juvenile court terminated her reunification services and continued the matter to February 13, 2002, for a section 366.26 hearing. Mother did not seek review of that order.

² Mother had not visited Alfredo and Guadalupe.

On November 9, 2002, Sergio was placed with Julian M. Meanwhile, on October 10, 2002, mother was deported to Mexico, but the department was not informed of this fact. Accordingly, in a declaration of due diligence for the February 13, 2002, hearing, the department indicated that mother's whereabouts were unknown. Mother had not visited with Sergio for five months. Julian M. had changed his preference from adoption to legal guardianship, but indicated he would consider adoption at a later date. At the hearing, the juvenile court appointed Julian M. as Sergio's legal guardian, but did not terminate mother's parental rights.³ It granted mother monitored visits with Sergio.

By the time of the August 14, 2002, review hearing, Julian M. was providing Sergio with "a stable, nurturing, and loving environment" and wanted to adopt him. By the February 5, 2003, review hearing, Sergio was continuing to thrive in Julian M.'s home.

On March 6, 2003, mother's parole officer informed the social worker that mother had been deported to Mexico. On March 21, 2003, mother informed the department that she had re-entered the United States, contrary to the instructions of the United States Immigration Service, and wanted to visit her children. Mother would not disclose her address to the social worker but she agreed to come to the department office to discuss a visitation schedule. Mother did not do so.

The section 366.26 hearing was continued to July 21, 2003, at which time adoption was to be considered for the permanent plan. According to the report prepared for that hearing, mother wanted monitored visits with Sergio, whom she had not seen in two years. But Sergio, now 9 years, 8 months old, was refusing to see her. Sergio was referred to a therapist to determine whether visits with mother were in Sergio's best interest. Meanwhile, the department recommended terminating mother's visitation with Sergio. At the hearing, the juvenile court inquired whether mother intended contesting

³ As to Alfredo and Guadalupe, the juvenile court transferred their custody to Julian M., gave mother continued visitation and terminated jurisdiction.

the adoption recommendation, but mother had not yet decided. The matter was continued to November 17, 2003.

Meanwhile, in a letter to the social worker dated August 11, 2003, psychologist Luis Lucero opined that, after two individual sessions, Sergio presented with “symptoms of anxiety and confusion consistent with history of alleged physical abuse.” Sergio was refusing to visit with mother.

The section 366.26 hearing was continued to January 12, 2004. When mother contacted the department on January 2, 2004, to arrange a monitored visit with Sergio, she was told that a section 366.26 hearing was scheduled for January 12, 2004.

By the time of the hearing, mother had not seen Sergio for approximately two years. Over the preceding ten months, she had contacted the department three times to inquire about visiting him, but she refused to disclose her place of residence to the department. Sergio, meanwhile, continued to refuse to see mother.⁴ At the hearing, counsel for mother argued that during most of the time mother had not visited Sergio, she had been incarcerated or deported, and that she was now prepared to adhere to the case plan. Unpersuaded, the juvenile court followed the department’s recommendation and terminated mother’s visitation with Sergio, observing: “Sergio is ten years old, does not want to visit and be forced to visit. And someone he hasn’t seen in two years. To force him would be detrimental to him. Even if it wouldn’t be detrimental, there is at least one division of the Second District Court of Appeal who would view visits and RPP to be reunification services, and that I didn’t even need to make a finding of detriment.”

It is from this order that mother appeals.

⁴ According to the department, Sergio was still in counseling. The record does not include a report from the therapist.

DISCUSSION

No Abuse of Discretion in Terminating Visitation

Mother contends the juvenile court abused its discretion in terminating her visitation with Sergio. She argues that there was insufficient evidence that continued visitation would be detrimental to Sergio. We disagree.

On appeal from an order denying visitation, we review the juvenile court's finding of detriment for substantial evidence. (See, e.g., *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1238 [finding substantial evidence supported the juvenile court's finding of detriment arising from unwanted visits between mother and child].)⁵

In order to maintain ties between a parent and child, and to provide information relevant to deciding if and when to return the child to the parent's custody, "any order placing a child in foster care, and ordering reunification services, shall provide" for visitation between the parent and child. (§ 362.1, subd. (a)(1)(A).) Even after reunification services are terminated, visitation between a parent and dependent child must continue unless the juvenile court finds "that visitation would be detrimental to the child." (§ 366.21, subd. (h).) But a parent's "interest in the care, custody and companionship of their children is not to be maintained at the child's expense; the child's input and refusal and the possible adverse consequences if a visit is forced against the child's will are factors to be considered in administering visitation. [Citation.]"

⁵ Mother maintains that detriment must be proved by "clear and convincing" evidence. In *In re Manolito L.* (2001) 90 Cal.App.4th 753, however, the court held that the preponderance of the evidence test applies to the determination of whether visitation would be detrimental to the child. (*Id.* at pp. 761-762.) The distinction has little meaning on appeal since, as the court in *In re Mark L.* (2001) 94 Cal.App.4th 573 (*Mark L.*), noted, "[w]hether the test at the trial court is preponderance of the evidence or clear and convincing evidence, a substantial evidence standard of review applies on appeal." (*Id.* at p. 580, fn. 5.) Under that standard, we give " . . . full effect to the respondent's evidence, however slight, and disregard[] the appellant's evidence, however strong." . . ." (*Id.* at pp. 580-581, fn. omitted.)

(*In re S.H.* (2003) 111 Cal.App.4th 310, 317; *In re Julie M.* (1999) 69 Cal.App.4th 41, 50 [same].) A child's refusal to visit, however, cannot be the *sole* factor considered in determining visitation. (*In re S.H.*, *supra*, at p. 320; *In re Julie M.*, *supra*, at p. 51; *In re Danielle W.*, *supra*, 207 Cal.App.3d at p. 1237 [child's aversion to visiting an abusive parent may be a "dominant" factor in administering visitation, but it cannot be the sole factor].)

In *Mark L.*, *supra*, 94 Cal.App.4th 573, the juvenile court ordered visits between 12-year-old Mark and his adoptive father be discontinued based upon a finding that continued visitation would be detrimental to Mark because Mark had not lived with or visited his father for more than three years; at an earlier hearing Mark testified he feared his father because of physical abuse and would be uncomfortable in his presence even if accompanied by a third party; and, in an earlier written submission, Mark stated he had " 'vivid memories' of being physically abused by [the father] and [the father] once 'pick[ed] him up and [threw] him across a room.' " (*Id.* at p. 581.) Mark also stated he saw his father abuse his older sister. The appellate court affirmed, finding this evidence "constitutes evidence of detriment 'reasonable in nature, credible, and of solid value' [Citation.]" (*Ibid.*)

While the evidence in this case is not quite as strong as that in *Mark L.*, it is nonetheless sufficient to establish detriment. Here, in addition to Sergio's consistent refusal to see mother, the evidence established that, early in the dependency process, Sergio was diagnosed with Post-Traumatic Stress Disorder attributed to the lifestyle he witnessed arising, in significant part, out of mother's substance abuse. Even two years later, when Sergio was referred to a therapist to determine whether it was in Sergio's best interests to visit with mother, he still presented with symptoms of anxiety and confusion consistent with his history of physical abuse. In September 2003, Sergio was in weekly counseling but continued to refuse to see mother.⁶

⁶ We also find no merit in mother's argument that the social worker impermissibly delegated her responsibility for arranging visitation to Sergio and his therapist. In light of

This is in stark contrast to Sergio's relationship with Julian M. Early in the dependency proceedings, when visits with mother and Julian M. first began, Sergio objected to seeing either of them. Working with a therapist, Sergio made progress and eventually reunited with Julian M., who complied with the case plan and consistently visited with Sergio. Sergio was unable to make the same progress with mother because she did not visit with Sergio while she was incarcerated; even after she was released and before her deportation, she elected to not take advantage of the weekly two-hour visits she was allowed with Sergio, instead choosing to end the visits after just 20 minutes. When mother was deported to Mexico, she did not notify the department of her whereabouts so that Sergio, who already suffered from abandonment issues, could be told why his mother was not visiting him. When she returned to this country, she made only sporadic efforts to arrange visits with Sergio.

This evidence, considered along with Sergio's strong aversion to visiting with mother, was sufficient to support a finding of detriment. While Sergio's desires could not be determinative of the visitation issue, the juvenile court appropriately considered them as a dominant factor in determining detriment. (See *In re S.H.*, *supra*, 111 Cal.App.4th at p. 317; *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1207-1209 (*Jerome D.*)). That the court did not expressly describe the basis of its finding of detriment other than the reference to Sergio's desires is of no consequence; the record contains sufficient evidence of detriment.

Mother's reliance on *In re David D.* (1994) 28 Cal.App.4th 941 (*David D.*), and *Jerome D.*, *supra*, 84 Cal.App.4th 1200, for a contrary result is misplaced. In pertinent part, the issue in *Jerome D.* was whether the evidence supported the juvenile court's finding that the section 366.26, subdivision (c)(1) (§ 366.26(c)(1)) exception to the

Sergio's refusal to see mother, the social worker appropriately arranged for Sergio to see a therapist to determine whether continued visitation would be detrimental to him. It was the juvenile court that made the final decision.

preference for termination of parental rights and adoption did not apply. The appellate court found the evidence insufficient, reasoning that mother had maintained regular visitation and contact with Jerome, her relationship with him was parental, Jerome expressed a desire to live with her again and a therapist opined that Jerome could experience emotional difficulties if his relationship with the mother were severed. (*Id.* at pp. 1206-1207.) The appellate court expressly did not address the issue of whether the juvenile court erred in suspending the mother's visitation after her parental rights were terminated. (*Id.* at p. 1209.) Here, the issue is continued visitation, not termination of parental rights. Moreover, here, the evidence establishes that mother has not maintained regular visitation or contact with Sergio, her relationship with him is not parental, Sergio does not want to visit with her and he suffers from Post-Traumatic Stress Disorder arising from his experiences of mother's lifestyle.

In *David D.*, *supra*, 28 Cal.App.4th 941, the issue was whether the juvenile court erred in terminating the mother's parental rights to her three children and ordering the children placed for adoption. In that case, the mother was in compliance with the case plan when the juvenile court granted her unsupervised visits and then unsupervised overnight visits with the three children she voluntarily placed in foster care. (*Id.* at pp. 943-944.) After the mother attempted suicide during the reunification period, the overnight visits were terminated. Two months later, the juvenile court terminated all maternal visits. A month later, it suspended telephone contact between the mother and the children after the mother became "hysterical" and threatened the social worker who told her that the department was recommending adoption as the permanent placement plan. (*Id.* at p. 945.) The appellate court found the suspension of visitation inappropriate, reasoning that the mother had been regularly visiting the children, her suicide attempt did not involve violence to the children and did not occur in their presence, and the juvenile court did not consider the effect an abrupt termination of visitation would have on the minors. (*Id.* at p. 953.) Here, by contrast, mother had not maintained regular visitation or

even contact with Sergio and the evidence was uncontradicted that, far from adversely affecting Sergio, termination of visitation was what Sergio strongly desired.

Mother's Ability to Prevent Adoption Is Not a Factor to Consider

Also without merit is mother's contention that, "[g]iven the history of this case, the decision to terminate the last thread of contact between [mother] and Sergio was prejudicial error, requiring reversal." She argues that the "order discontinuing visitation altogether pending a permanency planning hearing where the child was due to be adopted, further assured that [mother] would be unable to provide any challenge to adoption as the permanent plan." We disagree.

The determination of whether to terminate visitation requires a finding that visitation would be detrimental to the child. (§ 366.21, subd. (h).) Here, the juvenile court made such a finding, which we have found was supported by substantial evidence. That the result of terminating visitation would make unlikely mother's ability to challenge adoption as a permanent placement plan, did not require the juvenile court to continue visitation despite the detriment to Sergio.

After the termination of reunification services, "parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability' [citation]" (*In re Stephanie* (1994) 7 Cal.4th 295, 317.) Here, mother's reunification services were terminated on October 23, 2001. From that time forward, the focus turned to Sergio's best interests. At that point in the proceedings, once it is found that continued visitation would be detrimental to Sergio, it is immaterial what effect a termination of visitation would have on mother's interests in the care, custody and companionship of Sergio.

Once again, mother's reliance on *David D.* does not compel a contrary result. In that case, the mother voluntarily placed her children in foster care because she could not care for them while she was ending an abusive relationship. The mother complied with the case plan, but suffered from depression and attempted suicide before the six-month

review hearing. After mother refused to allow her hospital records to be released to the juvenile court, the court suspended the mother's visitation. Mother appealed from the subsequent order terminating her parental rights. The appellate court reversed, finding that the juvenile court failed to consider the effect that termination of visitation would have on the children. (*David D.*, *supra*, 28 Cal.App.4th at pp. 952-954.) Here, by contrast, mother did not comply with the case plan. Moreover, implicit in the finding that continued visitation would be detrimental to Sergio is a consideration of the effect of termination on him.

DISPOSITION

The order is affirmed.

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RUBIN, J.

We concur:

COOPER, P.J.

FLIER, J.